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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. 972

[illegible] SERVICE OIL COMPANY and FRANK BRONSTEIN
d/b/a FRANK'S SERVICE STATION

vs.

THE CITY OF NEW YORK and THE NEW YORK CITY
TRANSIT AUTHORITY

BRIEF OF THE RESPONDENT, THE CITY OF NEW YORK IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 972

CITIES SERVICE OIL COMPANY and FRANK BRONCHICK, T/A FRANK'S SERVICE STATION,

Petitioners,

against

THE CITY OF NEW YORK and THE NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

BRIEF OF THE RESPONDENT, THE CITY OF NEW YORK, IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

The respondent, City of New York, for its statement in opposition to petitioner's application for a writ of certiorari, respectfully shows the following:

I. Statement of issue on application for a writ of certiorari to the Court of Appeals of the State of New York

The following is essentially the basic question which is here involved:

Does the respondent municipality's act in establishing bus stops on the public highways upon which the petitioners'

gasoline filling station premises abut, and the occasional and intermittent stopping of buses thereat in a fashion causing slight and intermittent interference with access to such gasoline filling station, assertedly resulting in loss of patronage, furnish the basis for a claim that there has been a taking of petitioners' property requiring compensation under the Fourteenth Amendment to the Constitution of the United States?

The petitioners' present claim of an unconstitutional deprivation of their property was not alleged in their complaint but was asserted for the first time on appeal to the Appellate Division of the New York Supreme Court (R. 5-10).

The New York Court of Appeals has held in this case that the petitioners' right of access to the abutting public highways is subject and subordinate to the rights of the public to travel thereover and that the respondents' acts in establishing and maintaining the bus stops do not result in a deprivation of property without due process of law (Petition, Appendix A, p. 26).

II. No substantial federal questions presented by the petition.

The nature and extent of the rights of a property owner to the abutting highway is a question of state law which this Court cannot review. *Sauer* v. *New York*, 206 U. S. 536, 548 (1907). This Court's holding in *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544 (1904), upon which petitioners rely [Petition p. 12], is not to the contrary. The basis for this Court's ruling in the *Muhlker case* was that the New York Court's judgment in that case was in conflict with the law of New York as previously pronounced in *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122 (1882) and therefore constituted an unlawful impairment of plaintiff's contractual rights. This is clearly shown by this Court's opinion in the *Sauer* case, *supra*, at pp. 549, 550.

The decision in this case is in accord with the decision in the *Sauer* case, *supra*, and with prior New York cases. Here, as in *Sauer*, the interference which resulted in the injury to the property owner's rights to the abutting highway resulted from a use of the highway for the sole benefit of the traveling public. Here, as there, the ruling of the state court was that such a use of the highway does not constitute an interference with the abutting property owner's rights which, as previously noted, are subject and subordinate to the rights of the traveling public. This holding was in full accord with all of the leading authorities on the subject. *Callanan et al.* v. *Gilman*, 107 N. Y. 360, 365 (1887); *Kane* v. *N. Y. E. R. R. Co.*, 125 N. Y. 164, 175-176 (1891); *Deshong* v. *City of New York*, 176 N. Y. 475, 483-484 (1903); *Sauer* v. *City of New York*, 180 N. Y. 27, 31 (1904), aff'd 206 U. S. 536 *supra*; *Jones Beach Blvd. Estate Inc.* v. *Moses*, 268 N. Y. 362, 368 (1935). The petitioners' claim that the New York courts ignored the holding in *Waldorf-Astoria Hotel Co.* v. *City of New York*, 212 N. Y. 97 (1914) [petition pp. 12-14] is without basis. To begin with, the actual holding of that case was that the local law there challenged was valid. That local law made provision for the establishment of public hack stands in front of various locations such as hotels, restaurants, etc., frequented by the public. The question directly presented was "whether such proposed use of the streets in front of private property involves an impairment of the easements of the abutting owner" (p. 101). In upholding the validity of that local law the New York Court of Appeals noted (p. 105) that an abutting owner's easement was impaired only in the case where "an absolute and permanent obstruction in a public street and involving the total and exclusive use of a portion thereof" was presented. The evidence most favorable to the petitioners here shows only an occasional and intermittent interference with access to the petitioners' premises. In this case the Court of Appeals clearly pointed out the distinction between a case of a permanent obstruction and one in which a minor and an inter-

mittent interference is involved (Petitioners' Appendix A, p. 28).

The question which petitioners seek to present as to whether their right of reasonable access to the abutting public highway under New York law was violated (Petition, p. 4) is patently a question of fact and not a question of law either state or federal. This would be so even if the record showed the claimed concession that petitioners sustained substantial damages from the maintenance and operation of the challenged bus stops (Petition, p. 3). The petitioners conceded that the City's Traffic Commission and the City established the subject bus stops by virtue of the power conferred upon them by the New York City Charter (Record 33). There can be no question that bus stops are a necessity if the public is to enjoy its paramount right under New York law to use the public highways for public travel, a right whose existence is not challenged. Statutes regulating or dealing with the movement of traffic on public highways constitute a valid exercise of the police power. *City of Buffalo* v. *Stevenson*, 207 N. Y. 258, 263 (1913). This Court has repeatedly ruled that damages resulting from the exercise of the police power do not constitute a taking of property within the meaning of the Fourteenth amendment of the Constitution of the United States. *Chicago Burlington &c. R'd* v. *Chicago*, 166 U. S. 226 (1897); *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453, 461 (1905).

In *Jamaica Water Supply Co.* v. *City of New York*, 346 U. S. 821 (1953), this Court denied certiorari to review the determination of the New York State court (304 N. Y. 917, affirming 280 App. Div. 834). The basis for the application of the Jamaica Water Supply Company to review the determination of the state court was that the acts of the City compelling the Jamaica Water Supply Company to relocate its mains in the street without the payment of compensation constituted a deprivation of property in violation of that company's rights under the Fourteenth Amendment.

We submit that the question presented by this application for certiorari has so repeatedly and uniformly been decided adversely to the petitioners' contention that no substantial question is presented by this application entitling the petitioners to invoke the jurisdiction of the Supreme Court of the United States.

CONCLUSION

The petition should be denied.

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June 15, 1959.